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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

MARK HOLSMAN, Plaintiff and Respondent, v. PAUL M. CARRICK, Defendant and Appellant.	H033054 (Santa Cruz County Super.Ct.No. CV155620)

This residential lease dispute involves appellant Paul M. Carrick, the owner of remote Santa Cruz County property located at 34000 Loma Prieta Way, Los Gatos, and his tenant and respondent, Mark Holsman. The relationship arose out of a January 2005 written lease, under which Carrick leased to Holsman on a month-to-month basis four buildings (collectively, the premises) at a monthly rental rate of $1,200. Shortly after Holsman sent a letter in January 2006 complaining about the condition of the premises, Carrick served a 30-day notice and thereafter commenced eviction proceedings (which he later dismissed). Holsman vacated the premises in April 2006.

Holsman brought an action for damages, alleging, inter alia, that Carrick, in response to Holsman's complaints about the condition and habitability of the premises, had retaliated against him in violation of section 1940.2 of the Civil Code.[1] A small claims action by Carrick seeking unpaid rent and damages was consolidated for trial with

[1] Further statutory references are to the Civil Code unless otherwise stated.

Holsman's action. After a bench trial, the court found in favor of Holsman and awarded a lump sum of $18,600 in damages as to five causes of action of the complaint. The court also found that Holsman was entitled to attorney fees and costs, and later entered judgment in favor of Holsman.

Carrick appeals from the judgment, claiming that there was no evidentiary basis for the court's (1) conclusion that the premises were not habitable; (2) finding that Carrick had retaliated against Holsman for complaining about the condition of the premises; and (3) award of damages in favor of Holsman. Carrick also claims error with respect to several matters that he describes as "procedural errors."

Our review of the record leads to the inescapable conclusion that there is insufficient evidence to support the judgment in favor of Holsman as to three (third, eighth, and tenth) of the causes of action. We also hold that there was sufficient evidence to support Holsman's breach of implied warranty of habitability claim, but that there was insufficient evidence to support a damages award of $18,600 on that (fourth) cause of action). As to the remaining (sixth) cause of action as to which the court found in favor of Holsman and awarded damages, we conclude that there was insufficient evidence to support a damage award in excess of the amount of the security deposit ($1,200). Accordingly, we will reverse and remand the matter to the trial court with instructions that it enter a new and different judgment in favor of Holsman on the sixth cause of action in the amount of $1,200, and (if the court determines that Holsman sustained actual damages as a result of the breach of implied warranty of habitability) in favor of Holsman on the fourth cause of action in an amount of damages supported by the evidence adduced at the prior trial that the court deems appropriate. We will also instruct the trial court that, after it vacates its postjudgment order awarding attorney fees and costs to Holsman, it should determine (a) whether Holsman is legally entitled to attorney fees, and if so, the amount of reasonable attorney fees, if any, that should be awarded,

and (b) whether, in its discretion, Holsman should recover statutory costs, and if so, the appropriate amount that should be awarded.

FACTUAL BACKGROUND[2]

Carrick and Holsman entered into a written month-to-month lease agreement on January 27, 2005. Under that agreement, Holsman leased the premises that consisted of four units, which were identified in an attached diagram as the main house, A-frame, studio, and garage; monthly rent was to be $1,200; Holsman was to provide a security deposit of $1,200; and occupancy was to commence on February 1, 2005. (Carrick lives in a house approximately one-quarter of a mile up the ridge from the rented premises.)

Before moving in, Holsman reviewed the lease agreement with Carrick, looked at the premises, and had a discussion with Carrick. Carrick mentioned that the "system [was] off the grid and ha[d] limitations" and made Holsman aware that electricity would be furnished by solar panels and a windmill.[3] Holsman had never lived in a home which had power supplied from alternative energy sources.

When he moved in (approximately February 1), Holsman found the main house to be "in such disrepair and in such bad condition and so dirty . . . it was unbelievable." There were holes and water stains in the ceiling, holes underneath the sink, several

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[2] "We recite the essential relevant facts 'in the manner most favorable to the judgment, resolving all conflicts and drawing all inferences in favor of respondent. [Citation.]' [Citation.]" (*Nwosu v. Uba* (2004) 122 Cal.App.4th 1229, 1233, fn. 2.) Where appropriate, however, in order to identify the evidentiary conflicts—principally concerning the condition of the premises and any repair efforts—we will explain in footnotes the conflicting testimony presented by Carrick. In addition, we observe that Carrick attempts in his opening brief to introduce a significant amount of additional evidence that was not presented at trial. We disregard all references to purported facts that are outside of the appellate record. (*Pulver v. Avco Financial Services* (1986) 182 Cal.App.3d 622, 631.)

[3] Carrick testified that he also advised Holman that power from the solar panels and windmill "could be supplemented with a generator if needed" and that there would be enough electricity if he had a generator.

broken windows, a hole in the bathroom door, a leaky bathroom faucet, and delaminated cabinets. There were also windows broken in the A-frame structure that was to be occupied by Holsman's son, Ian. Holsman's daughter and her mother spent a number of hours cleaning the premises before Holsman and Ian moved in.

There was no power when Holsman moved in. He called Carrick, who determined that "the system was on zero" because the batteries for the solar power system had no charge. Carrick made repairs, but it took a couple of days to fully charge the system. Additionally, Holsman informed Carrick about the broken windows. Carrick's method of dealing with the problem was to locate the shards of glass, fit them into the opening and tape them back into place.[4]

After moving in, Holsman determined that there was a problem with the windmill's ability to generate power. After the first rain and when there was some wind, the windmill did not work; in speaking to Carrick about the problem, Carrick informed Holsman that " ' . . . whenever it rains the windmill [becomes] inoperable—it needs three weeks of dry weather for it to work.' " During Holsman's occupancy, there were at least four or five occasions in which he had no electrical power. When "[t]he solar system went out completely," Holsman testified that it was difficult to convince Carrick that there was a problem, because "[Carrick] insisted it was just [Holsman's] misuse of the system or that [Holsman] was overusing it and in each case when . . . [Holsman] could finally demonstrate there was no power coming into the system[,Carrick] would finally come down and find some little problem."[5] Thus, on several occasions as well as in the

[4] Carrick testified that there was only one cracked window when Holsman moved in, and that it had been taped up years earlier by the prior owner.

[5] Carrick testified that Holsman complained several times about the electricity—that the charging rate for the solar system batteries was low and, on occasion, that there was no electricity at all—and that in each instance, he immediately investigated the problem and resolved it.

wintertime, Holsman had difficulty obtaining enough power generated by the solar panels.[6]

The propane heater in the A-frame house where Ian lived never worked. Holsman asked Carrick eight to ten times to repair it. It was not repaired; Carrick finally supplied a new heater for the A-frame on the day Ian moved out in April 2006. In addition, the propane heater in the studio was broken. Holsman asked Carrick to repair it, but he never tried to fix it. (Holsman had hoped to sublet the studio; however, without heat, no one was interested in living there.) The propane heater in the main house was also in disrepair. Holsman informed Carrick that it didn't work, but he may not have made a demand that it be repaired because his focus was on the repair of the heater in the A-frame house.[7] Lastly, there was a wood-burning stove in the main house that had a problem with the venting. Holsman asked Carrick to fix it; he made some effort but it was unsuccessful.[8]

Holsman also experienced problems with leaky roofs. These problems did not manifest themselves immediately because there wasn't much rainfall at or about the time Holsman and Ian commenced occupancy. There was "one enormous leak" in the corner of the living room where Holsman "had to put all sorts of pales [*sic*] out to catch all of the water that came down and that was that way for the duration of [his] tenancy." The ceiling in the living room in the area of the leak "was not only discolored, . . . it [was] just rotted out." There were also several smaller roof leaks in places where wiring from the

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[6] Joshua Corey, Carrick's tenant at another A-frame house located near Holsman's premises, testified that he was aware that Holsman had significant problems with windmill-generated power and that his system for generating power through alternative energy sources was not as good as Corey's system of solar- and wind-generated power.

[7] Carrick testified that the heaters in the main house and A-frame were operational when Holsman moved in.

[8] Carrick testified that his repairs did resolve the problem, since he never heard another complaint about it.

solar panel on the rooftop went through the ceiling. There were also leaks in the studio by the sliding glass door. Holsman asked Carrick to repair the leaks in the main house. Carrick went up on the roof and made some repairs; some of the smaller leaks were diminished but the large leak was not remedied. Lastly, during heavy rains, water poured through the back wall of the cinderblock garage, and there were also a number of small roof leaks where wires from the solar panels pierced the ceiling. Carrick was able to lessen the roof leaks but could not remedy the larger leak at the back wall.[9]

Holsman paid rent of $1,200 per month for 11 months. Prior to moving into the premises in February 2005, he gave Carrick $1,200 for the security deposit. In retrospect, he viewed the condition of the premises throughout his occupancy to have been substandard and "far from being in [his] mind suitable." The third or fourth time that Holsman complained about the failure of the electrical system, Carrick told him that "it was [Holsman's] own fault[,] that [he] was overusing the system[,] and that [he] should really consider leaving . . . ."

On January 6, 2006, Holsman hand-delivered a letter to Carrick's home. The purpose of the letter was to inform Carrick that Holsman was "tired of living without . . . these major components of [the lease] agreement" (namely, power and heat); he "had gotten no adequate response from [Carrick] [with]in a reasonable time; and he did not intend to pay any further rent until the premises were repaired. Holsman testified that he left the letter for Carrick "in lieu of" paying rent. Carrick responded within the next two days by angrily confronting Holsman. He told Holsman that if he would not pay the rent, Carrick would evict him.

Holsman received a note from Carrick dated January 13, 2006, in which Carrick acknowledged receipt of Holsman's January 6 letter. Carrick stated, "[I]t has been a

[9] Carrick testified that his efforts to repair the roof leaks were successful; he asked Holsman if he was still experiencing leaks and he responded that "they were okay."

pleasure working with you to remedy deficiencies which you have pointed out during the months that you have rented. I would look forward to remedy[ing] the additional ones listed in your letter." Holsman testified that Carrick did not remedy the defects described in Holman's January 6 letter and that the next occurrence was Carrick's service upon Holsman in mid-January of a 30-day notice to vacate the premises.[10] After receiving the notice, Holsman contacted the Santa Cruz County Health and Planning Departments.

Carrick filed an unlawful detainer action against Holsman in February 2006. He dismissed the action in March 2006. Carrick testified that his reason for doing so was that he had filed suit sooner than the date permitted by statute. Carrick also filed a small claims action against Holsman in September 2006 to recover unpaid rent and money expended to repair the premises allegedly damaged by Holsman. That case was consolidated with Holsman's action.

Holsman made no rent payments in 2006. He moved out in the middle of April 2006. When Holsman vacated the premises, he left one or possibly two truckloads of trash; he left suddenly because he was concerned for his safety. Holsman did not cause

[10] Carrick testified that he received the January 6 letter within a day; he was disappointed by its contents because Holsman had not previously made the complaints about the premises voiced in the letter; he understood from the letter that Holsman "was repudiating the rental contract"; and he did make repairs that Holsman requested in the letter. Carrick testified further that he made repairs to the windmill, and he attempted to repair the heater in the A-frame but was unsuccessful; he then offered to replace it, but Holsman told him not to worry about it.

any permanent damage to the premises.[11] After vacating the premises, Holsman neither received his security deposit back nor an itemized statement of its disposition.[12]

PROCEDURAL BACKGROUND

On October 31, 2006, Holsman filed a complaint for damages alleging 12 causes of action against Carrick. In it, he alleged that in January 2005, he, as tenant, and Carrick, as landlord, had entered into a written month-to-month lease agreement under which occupancy would commence on March 1, 2005. Holsman alleged further that the premises did not have a certificate of occupancy and that they had been constructed without the issuance of proper permits. He claimed that the premises were maintained throughout the period he occupied them in a substantially uninhabitable condition. Holsman claimed that Carrick, in response to Holsman's request for repairs to the premises and his complaint to the County of Santa Cruz about the condition of the premises, retaliated by harassing him, threatening to evict him, commencing an unlawful detainer action, and "decreasing services." He alleged that Carrick filed an unlawful detainer action in February 2006 against Holsman (as Santa Cruz Superior Court case number CV153544),[13] "which resulted in a favorable termination for Holsman."

[11] Carrick testified that Holsman did, in fact, cause physical damage to the premises, including broken windows, a severely burned carpet requiring replacement, and a broken window seat. He also testified that the trash Holsman left behind resulted in Carrick having to make six trips to the dump. He calculated the damages for these items, including the replacement of a propane tank, to be $2,046.12. Thus, Carrick testified that he was owed this amount, plus four months' rent for 2006, less the security deposit, for a total of $5,646.

[12] Carrick testified that he prepared an itemization concerning the security deposit in May or June 2006. He did not send it to Holsman; he testified that Holsman did not provide him with a forwarding address.

[13] The complaint erroneously referred to the unlawful detainer action as having been filed in Santa Clara County.

After a court trial, the trial judge issued a written tentative decision in Holsman's favor. In that decision, the court ruled that Holsman should prevail and recover monetary damages as to five causes of action, namely, the third (action under section 1940.2), fourth (breach of covenant of habitability under section 1941), sixth (recovery of security deposit), eighth (retaliation), and 10th (malicious prosecution) causes of action. The court assessed damages in the amount of $18,600 as to those specified causes of action and awarded Holsman attorney fees and costs. The court denied relief as to the remainder of the causes of action. It specifically found that Holsman should prevail as to the first (restitution), second (nuisance), fifth (violation of section 1942.4), and 12th (intentional infliction of emotional distress) causes of action, but that he had proved no damages in support of those theories. The court indicated, "Judgment is denied" as to the seventh (trespass) cause of action. The court (paradoxically) concluded that "[p]laintiff has prevailed here" as to the 11th (breach of contract) cause of action, but did not include this claim among the causes of action as to which the damage award of $18,600 pertained.[14] Lastly, the court—presumably referring to Carrick's consolidated small claims complaint—held that "[d]efendant's cross-complaint judgment is denied."

Carrick filed objections to the court's tentative decision, in response to which the court issued its "Statement of Decision" noting that it would "make no changes to the findings [in its tentative decision] and make [that] written decision . . . its final judgment." Consistently with the tentative decision, judgment was entered on April 16, 2008. The judgment indicated that Holsman would also be awarded attorney fees and costs in addition to the damage award of $18,600. Thereafter, by minute order of June 4, 2008, the court awarded Holsman attorney fees of $7,500 and costs of $1,296.97. Carrick filed a timely notice of appeal on June 12, 2008.

[14] Holsman abandoned the ninth cause of action for wrongful eviction.

ISSUES ON APPEAL

Carrick presents the following issues:

1. There was insufficient evidence to support the court's finding that the premises were uninhabitable.

2. There was insufficient evidence to support the court's conclusion that Holsman acted in a retaliatory manner by serving upon Carrick a 30-day notice directly after receiving Carrick's notice to repair defective conditions of the premises or to withhold rent.

3. There was insufficient evidence to support the award of damages in the judgment in favor of Holsman.

4. The court erred in excluding testimony from a subsequent tenant that the premises were habitable.

5. There were other "procedural errors."

In the course of evaluating whether there was sufficient evidence to support a monetary judgment in favor of Holsman as to the third, fourth, sixth, eighth, and 10th causes of action, we address the first three contentions below.[15]

DISCUSSION

I. *Substantial Evidence Standard*

Carrick's principal claims of error here challenge the court's findings that (1) the premises were uninhabitable, (2) Carrick acted in a retaliatory manner, and (3) Holsman was entitled to damages in the amount of $18,600. Each of these challenges is to the sufficiency of the evidence supporting the judgment. Accordingly, the substantial evidence standard of review applies.

[15] Because we hold that the judgment as to each of the five causes of action in which Holsman prevailed must be reversed, we need not address Carrick's fourth and fifth claims of error. (*Shaw v. County of Santa Cruz* (2008) 170 Cal.App.4th 229, 259.)

A disputed factual issue that has been resolved by the trial court is reviewed on appeal under the substantial evidence standard. (*Winograd v. American Broadcasting Co.* (1998) 68 Cal.App.4th 624, 632.) This standard applies where the question is whether there was sufficient evidence to support the trier of fact's award of damages. (*Pellegrini v. Weiss* (2008) 165 Cal.App.4th 515, 531-532.) As explained by the Supreme Court a number of years ago, "In reviewing the evidence on such an appeal all conflicts must be resolved in favor of the respondent, and all legitimate and reasonable inferences indulged in to uphold the verdict if possible. It is an elementary, but often overlooked principle of law, that when a verdict is attacked as being unsupported, the power of the appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support the conclusion reached by the jury. When two or more inferences can be reasonably deduced from the facts, the reviewing court is without power to substitute its deductions for those of the trial court. [Citations.]" (*Crawford v. Southern Pacific Co.* (1935) 3 Cal.2d 427, 429.) Although the record must be reviewed in its entirety, "all of the evidence must be examined, but it is not weighed. All of the evidence most favorable to the respondent must be accepted as true, and that unfavorable discarded as not having sufficient verity, to be accepted by the trier of fact. If the evidence so viewed is sufficient as a matter of law, the judgment must be affirmed." (*In re Teel's Estate* (1944) 25 Cal.2d 520, 527.)

As one court has eloquently summarized the substantial evidence standard of review: " 'Substantial evidence' is evidence of ponderable legal significance, evidence that is reasonable, credible and of solid value. [Citations.] 'Substantial evidence . . . is not synonymous with "any" evidence.' Instead, it is ' " 'substantial' proof of the essentials which the law requires." ' [Citations.] The focus is on the quality, rather than the quantity, of the evidence. 'Very little solid evidence may be "substantial," while a lot of extremely weak evidence might be "insubstantial." ' [Citation.] Inferences may constitute substantial evidence, but they must be the product of logic and reason.

Speculation or conjecture alone is not substantial evidence. [Citations.] . . . [¶] The ultimate test is whether it is reasonable for a trier of fact to make the ruling in question in light of the whole record. [Citation.] 'A formulation of the substantial evidence rule which stresses the importance of isolated evidence supporting the judgment, . . . risks misleading the court into abdicating its duty to appraise the whole record. . . .' [Citation.] [¶] Substantial evidence is therefore not merely an appellate incantation designed to conjure up an affirmance. To the contrary, it is essential to the integrity of the judicial process that a judgment be supported by evidence that is at least substantial. An appellate court need not 'blindly seize any evidence . . . in order to affirm the judgment. The Court of Appeal "was not created . . . merely to echo the determinations of the trial court. A decision supported by a mere scintilla of evidence need not be affirmed on review." ' " (*Roddenberry v. Roddenberry* (1996) 44 Cal.App.4th 634, 651-652.)

It is the appellant's burden to establish that the judgment is not supported by substantial evidence. (*In re Adoption of Allison C.* (2008) 164 Cal.App.4th 1004, 1011.) In meeting that burden, the appellant is charged with presenting an adequate record from which the error is demonstrated. (*Maria P. v. Riles* (1987) 43 Cal.3d 1281, 1295.)

II. *Third Cause of Action (Section 1940.2)*

Holsman alleged in his complaint that throughout his tenancy, Carrick "continually violated [section] 1940.2, by violating Penal Code [sections] 484 and 518, and Civil Code [sections] 1927 and 1954, in particular, by taking Holsman's money under threat of eviction, defrauding Holsman of the rent and security deposit, maliciously disturbing Holsman's quiet enjoyment of the premises, and trespassing into the premises." He sought statutory damages of $2,000 for each wrongful act, and a total amount of statutory damages of $40,000.[16] The court concluded—as reflected in both the

[16] This allegation is contradicted by Holsman in the general prayer for damages at the end of the complaint in which he seeks statutory damages in the amount of $30,000.

tentative decision and judgment[17]—that "[p]laintiff has proven this cause by the evidence presented and the actions of Defendant in response to his demand letter."

Section 1940.2 makes it unlawful for a landlord to commit certain specified acts "for the purpose of influencing a tenant to vacate a dwelling."[18] (§ 1940.2, subd. (a).) One such act is theft, i.e., violation of Penal Code section 484. (§ 1940.2, subd. (a)(1).) No evidence was presented that Carrick committed any acts of theft.

A second prohibited act under section 1940.2 is a violation of Penal Code section 518, i.e., extortion. (§ 1940.2, subd. (a)(2).) There is no evidence that Carrick obtained property from Holsman that was "induced by a wrongful use of force or fear." (Pen. Code, § 518.)

Section 1940.2 also prohibits a landlord from "[using], or threaten[ening] to use force, willful threats, or menacing conduct constituting a course of conduct that interferes with the tenant's quiet enjoyment of the premises in violation of Section 1927 that would create an apprehension of harm in a reasonable person." (Subd. (a)(3).) Although there was evidence that Carrick served Holsman with a 30-day notice and thereafter commenced unlawful detainer proceedings, this evidence is insufficient to satisfy the prohibition under section 1940.2, subdivision (a)(3).

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[17] The language found in the tentative decision and judgment, insofar as it indicates the disposition of the matter as to each cause of action of the complaint, is identical.

[18] "It is unlawful for a landlord to do any of the following for the purpose of influencing a tenant to vacate a dwelling: [¶] (1) Engage in conduct that violates subdivision (a) of Section 484 of the Penal Code. [¶] (2) Engage in conduct that violates Section 518 of the Penal Code. [¶] (3) Use, or threaten to use force, willful threats, or menacing conduct constituting a course of conduct that interferes with the tenant's quiet enjoyment of the premises in violation of Section 1927 that would create an apprehension of harm in a reasonable person . . . . [¶] (4) Commit a significant and intentional violation of Section 1954." (§ 1940.2, subd. (a).)

A fourth and final prohibited landlord act is the commission of "a significant and intentional violation of Section 1954 [unauthorized entry of a dwelling]." (§ 1940.2, subd. (a)(4).) Here, there was testimony by Holsman that Carrick twice entered the leased premises without invitation to work on the propane stove, and that he twice showed up and was working on the roof without letting Holsman know in advance that he would be entering the premises. Holsman also testified that Carrick introduced two goats on the premises without Holsman's permission. This evidence—controverted by Carrick[19]—would not support a finding of a "significant and intentional" unlawful entry under section 1940.2. Indeed, we may infer that the trial court concluded that Carrick did not commit a "significant and intentional" unlawful entry of the premises, since it specifically found in Carrick's favor on the seventh cause of action for trespass.

The purpose of section 1940.2 is to prohibit a landlord's use of " 'constructive' self-help eviction" techniques (Friedman et al., Cal. Practice Guide: Landlord–Tenant (The Ruttter Group 2009) ¶ 7:42, p. 7-14), such as theft, extortion, interference with a tenant's quiet enjoyment, or trespass "for the purpose of influencing a tenant to vacate a dwelling." (§ 1940.2, subd. (a).) There is no substantial evidence to support an implied finding here that Carrick committed an act prohibited under section 1940.2, subdivision (a) to influence Holsman to vacate the premises. Therefore, the judgment, insofar as it found in favor of Holsman and awarded damages on the third cause of action, must be reversed.

III. *Fourth Cause of Action (Breach of Implied Warranty of Habitability)*

Holsman alleged in the fourth cause of action of his complaint that Carrick was obligated to maintain the premises in a habitable condition pursuant to section 1941; he

[19] Carrick testified that he did not enter the premises or work on the roof without Holsman's permission, and that Holsman gave his permission to introduce the goats on the property for weed control.

breached that obligation; and he was liable in damages to Holsman in the sum of $50,000. In contrast to the fifth cause of action for violation of statute (§ 1942.4), Holsman did not seek statutory damages under the fourth cause of action. The court concluded that "[h]abitability is the clear issue here; . . . Plaintiff has proven this cause of action."

Our high court has held that because "under contemporary conditions, public policy compels landlords to bear the primary responsibility for maintaining safe, clean and habitable housing in our state," there is a warranty of habitability implied in residential leases in California. (*Green v. Superior Court* (1974) 10 Cal.3d 616, 627 (*Green*).) The court explained that "[t]his implied warranty of habitability does not require that a landlord ensure that leased premises are in perfect, aesthetically pleasing condition, but it does mean that 'bare living requirements' must be maintained. In most cases substantial compliance with those applicable building and housing code standards which materially affect health and safety will suffice to meet the landlord's obligations under the common law implied warranty of habitability we now recognize." (*Id.* at pp. 637, fns. omitted.) The court held that a tenant may assert the landlord's breach of the implied warranty of habitability as a defense to an unlawful detainer proceeding. (*Id.* at pp. 631-637.) And a landlord's obligation to maintain premises in a habitable condition is one that continues throughout the term of the lease. (*Peterson v. Superior Court* (1995) 10 Cal.4th 1185, 1204.) In the event of a landlord's breach of the implied warranty of habitability, the tenant is not absolved of the obligation to pay rent; rather the tenant remains liable for the reasonable rental value as determined by the court for the period that the defective condition of the premises existed. (*Stoiber v. Honeychuck* (1980) 101 Cal.App.3d 903. 914; *Hinson v. Delis* (1972) 26 Cal.App.3d 62, 70, disapproved on another ground in *Knight v. Hallsthammar* (1981) 29 Cal.3d 46, 55, fn. 7; see also Code Civ. Proc., § 1174.2, subd. (a) [in unlawful detainer action after

nonpayment of rent, where tenant proves substantial breach of habitability warranty, court determines reasonable rental value of premises in its untenantable condition].)

In addition to asserting a breach of the habitability warranty as a defense to an unlawful detainer action, a tenant may bring suit on against the landlord for damages resulting from such breach. (*Landeros v. Pankey* (1995) 39 Cal.App.4th 1167, 1169; 7 Miller & Starr, Cal. Real Estate (3d ed. 2004) § 19:121, p. 362; Friedman et al., Cal. Practice Guide: Landlord–Tenant, *supra*, ¶¶ 3:97-3:100, pp. 3-40.4 to 3-40.5.) The elements of such an affirmative claim are the existence of a material defective condition affecting the premises' habitability, notice to the landlord of the condition within a reasonable time after the tenant's discovery of the condition, the landlord was given a reasonable time to correct the deficiency, and resulting damages. (*Quevedo v. Braga* (1977) 72 Cal.App.3d Supp. 1, 7-8 (*Quevedo*), disapproved on other grounds in *Knight v. Hallsthammar*, *supra*, 29 Cal.3d at p. 55, fn. 7; see also Friedman et al., *supra*, ¶ 3:100, p. 3-40.5.)

According to the *Quevedo* court, the measure of damages is the amount of rent that the landlord should refund, calculated by the difference between the rent paid while the premises were uninhabitable and the rent that "would have been reasonable, taking into account the extent to which the rental value of the property was reduced by virtue of the existence of the defect." (*Quevedo, supra,* 72 Cal.App.3d at p. Supp. 8.) Other methods of calculating a tenant's damages for breach of the habitability warranty include (1) the difference between the fair rental value of the premises had they been in the condition warranted and their fair rental value with the uninhabitable condition (*Green, supra,* 10 Cal.3d at p. 638), and (2) the rent paid by the tenant multiplied by the percentage of the premises rendered unusable due to the uninhabitable condition (*id.* at p. 639, fn. 24; *Cazares v. Ortiz* (1980) 109 Cal.App.3d Supp. 23, 33).

Additionally, there is a statutory cause of action available to the residential tenant where the premises are untenantable and other circumstances exist. Under section

1942.4, a residential landlord may not demand or collect rent, increase rent, or serve a three-day notice to pay rent or quit if (1) the dwelling is untenantable as defined under section 1941.1, is in violation of section 17920.10 of the Health and Safety Code, or is deemed and declared substandard under section 17920.3 of the Health and Safety Code; (2) a public officer inspects the premises and gives the landlord written notice that it must abate the nuisance or repair the property; (3) the conditions have not been remedied within 35 days of the notice; and (4) the substandard conditions were not caused by the tenant's acts or omissions. (§ 1942.4, subd. (a).)[20] In the event each of the circumstances under subdivision (a) of the statute is satisfied, a tenant may bring an action for actual damages plus statutory damages of between $100 and $5,000. (§ 1942.4, subd. (b)(1).)[21] This statutory cause of action is one that Holsman asserted in the fifth cause of action, a

[20] "A landlord of a dwelling may not demand rent, collect rent, issue a notice of a rent increase, or issue a three-day notice to pay rent or quit pursuant to subdivision (2) of Section 1161 of the Code of Civil Procedure, if all of the following conditions exist prior to the landlord's demand or notice: [¶] (1) The dwelling substantially lacks any of the affirmative standard characteristics listed in Section 1941.1 or violates Section 17920.10 of the Health and Safety Code, or is deemed and declared substandard as set forth in Section 17920.3 of the Health and Safety Code because conditions listed in that section exist to an extent that endangers the life, limb, health, property, safety, or welfare of the public or the occupants of the dwelling. [¶] (2) A public officer or employee who is responsible for the enforcement of any housing law, after inspecting the premises, has notified the landlord or the landlord's agent in writing of his or her obligations to abate the nuisance or repair the substandard conditions. [¶] (3) The conditions have existed and have not been abated 35 days beyond the date of service of the notice specified in paragraph (2) and the delay is without good cause . . . . [¶] (4) The conditions were not caused by an act or omission of the tenant or lessee in violation of Section 1929 or 1941.2." (§ 1942.4, subd. (a).)

[21] "A landlord who violates this section is liable to the tenant or lessee for the actual damages sustained by the tenant or lessee and special damages of not less than one hundred dollars ($100) and not more than five thousand dollars ($5,000)." (§ 1942.4, subd. (b)(1).)

claim that the court below concluded "based on [its] reading of the code, Plaintiff prevails here but takes nothing."[22]

It is plain for at least three reasons that the fourth cause of action was a nonstatutory claim for breach of the implied warranty of habitability: (1) a statutory claim based upon a landlord's failure to maintain premises in a habitable condition under section 1942.4 is not the exclusive tenant remedy (§ 1942.4, subd. (f)); (2) Holsman's statutory claim under section 1942.4 was asserted in the fifth cause of action; and (3) Holsman did not plead a violation of section 1942.4 or request statutory damages in the fourth cause of action. Were the challenge only that there was insufficient evidence to support a finding of a breach of the implied warranty of habitability, we might readily reject that contention. There was substantial evidence from which the court could have concluded that the premises were uninhabitable for an appreciable period of time, due to water intrusion, electrical power, and heating concerns about which Holsman testified. (See § 1941.1, providing that a dwelling is untenantable where it "substantially lacks" "[e]ffective waterproofing and weather protection of roof and exterior walls . . ." (*id.* at subd. (a)), "[h]eating facilities . . ." (*id.* at subd. (d)), and "[e]lectrical lighting . . ." (*id.* at subd. (e)).) But in asserting this claim, Holsman was required to present evidence of damages resulting from the breach of the habitability warranty. (*Quevedo, supra*, 72 Cal.App.3d at Supp. 8; see *McDonald v. John P. Scripps Newspaper* (1989) 210 Cal.App.3d 100, 104 [no recovery on contract claim where no resulting damage shown].) The record discloses that no such evidence was presented that would justify an award of $18,600 in damages. There was, for instance, no testimony from which the court could

[22] Since this finding is in reality one in favor of Carrick, and Holsman did not file a cross-appeal challenging it, we express no view as to whether Holsman presented a prima facie case of a violation of section 1942.4, subdivision (a), or whether the court properly concluded that he should "take[] nothing" with respect to the claim. (*In re Estate of Powell* (2000) 83 Cal.App.4th 1434, 1439 [respondent who has not filed cross-appeal may not assert error on appeal].)

have determined damages of $18,600 based upon the difference between the amount of rent paid and the reasonable rental value of the premises with the conditions that Holsman claimed rendered them uninhabitable. (*Ibid.*) Likewise, there was no evidence establishing damages of $18,600 based upon the percentage of the premises that were rendered unusable because of defective conditions that could be used as a multiple to establish the amount of an appropriate rent refund. (See *Cazares v. Ortiz*, *supra*, 109 Cal.App.3d at Supp. 33.) Indeed, it appears that the court highlighted this issue by noting—in connection with a potentially dispositive motion brought by Carrick's counsel after Holsman rested—that Holsman had failed to present any evidence of actual damages.[23]

Accordingly, because the record demonstrates no substantial evidence in support of an award of $18,600 in actual damages for the breach of the habitability warranty, the judgment must be reversed as to the fourth cause of action. However, in light of the record supporting the court's finding that a breach of said warranty occurred, we deem it appropriate to remand the cause to the trial court with directions that it reconsider the evidence presented before it at the trial and to enter an award of damages on the fourth cause of action in an amount the court deems appropriate and supported by the evidence previously presented. (See *Marriage of Fonstein* (1976) 17 Cal.3d 738, 751 [no new trial

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[23] The reporter's transcript reads in relevant part: "We did have a discussion about some issues of proof. I've given you both some ideas about that, but I will agree with you at this point, in relation to the motion for non suit [*sic*] . . . there are no specific damages that have been testified to or proven . . . but I agree that there is a lack of evidence as to specific damages incurred by Mr. Holsman at this point." Although the transcript attributes these remarks to Carrick's counsel, it appears clear from the context that this attribution is erroneous and that the comments were those of the trial judge. The comments followed argument by Carrick's counsel in what she erroneously termed a motion for nonsuit. Since a nonsuit motion is appropriate only in jury trials (see Code Civ. Proc., § 581c, subd. (a)), it is apparent that the motion—denied by the court—was in reality a motion for judgment under section 631.8 of the Code of Civil Procedure.

required after reversal where ample evidence available from first trial upon which court can reach determination].)[24]

IV. *Sixth Cause of Action (Security Deposit*)

Holsman alleged in the sixth cause of action of the complaint that he had paid to Carrick at the inception of the lease the sum of $1,200 as a security deposit; more than 21 days had passed since Holsman had vacated the premises; Carrick failed to return the deposit or account for its use; Carrick acted in bad faith and waived any right to retain the deposit; and Holsman was entitled to triple the amount of the deposit. The court concluded that "[h]ere Defendant did not comply with the provisions of the law; Judgment as requested."

Section 1950.5, subdivision (g) requires that a residential landlord, within 21 days of a tenant's vacating the premises, provide the tenant with "an itemized statement indicating the basis for, and the amount of, any security received and the disposition of the security and shall return any remaining portion of the security to the tenant."[25] The

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[24] Because Holsman had an adequate opportunity to present evidence of any actual damages he sustained as a result of Carrick's breach of the implied warranty of habitability—and because the trial court advised Holsman at the time of Carrick's purported motion for nonsuit that his proof of damages was lacking (see fn. 23, *ante*), and Holsman thereafter did not move to reopen his case in chief—we conclude that it would be inappropriate to permit a new trial on the limited issue of damages. (See *Kelly v. Haag* (2006) 145 Cal.App.4th 910, 919 [new trial on punitive damages deemed inappropriate where plaintiff had a full and fair opportunity to present case].)

[25] "(1) No later than 21 calendar days after the tenant has vacated the premises, but not earlier than the time that either the landlord or the tenant provides a notice to terminate the tenancy under Section 1946 or 1946.1, Section 1161 of the Code of Civil Procedure, or not earlier than 60 calendar days prior to the expiration of a fixed-term lease, the landlord shall furnish the tenant, by personal delivery or by first-class mail, postage prepaid, a copy of an itemized statement indicating the basis for, and the amount of, any security received and the disposition of the security and shall return any remaining portion of the security to the tenant. [¶] (2) Along with the itemized statement, the landlord shall also include copies of documents showing charges incurred and deducted by the landlord to repair or clean the premises, . . . " (§ 1950.5, subd. (g).)

statement must include documentation of the charges the landlord incurred to clean or repair the premises, and the landlord must return any portion of the deposit remaining after the deduction of the charges. (§ 1950.5, subd. (g)(2).) When the landlord fails to comply with section 1950.5, subdivision (g), he or she forfeits the right to retain all or any portion of the security deposit pursuant to the " 'summary deduct-and-retain' procedure" provided under the statute. (Friedman et al., Cal. Practice Guide: Landlord – Tenant, *supra*, ¶ 2:783, p. 2E-16, quoting *Granberry v. Islay Investments* (1995) 9 Cal.4th 738, 745.)[26] And where the landlord makes a "bad faith claim or retention" of all or any portion of the security deposit, the landlord may be subject to statutory damages of up to twice the amount of the security, in addition to actual damages. (§ 1950.5, subd. (*l*).)

Carrick contended below that he could not send Holsman the itemized statement of the disposition of the security deposit he had prepared because Holsman failed to provide him with a forwarding address when he moved out. This failure on Holsman's part, however, afforded Carrick with no excuse for complying with section 1950.5, subdivision (g), which requires a landlord to send the itemized statement to the leased premises if the tenant does not provide a forwarding address. (§ 1950.5, subd. (g)(6).)[27]

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[26] The Supreme Court clarified, however, that even if a landlord has lost the right to the summary procedure under section 1950.5, subdivision (g), he or she may nonetheless "recover damages for unpaid rent, repairs and cleaning [citation] in a subsequent judicial proceeding provided that he [or she] proves by a preponderance of the evidence that he [or she] has suffered such damages and that the amount claimed is reasonable [citation]." (*Granberry v. Islay Investments*, *supra*, 9 Cal.4th at pp. 749-750, fn. omitted.). Because Carrick does not challenge the judgment herein insofar as it awarded him nothing on his consolidated complaint to recover unpaid rent and damages, any such challenge is forfeited, and we have no occasion to address the propriety of such finding. (*Tiernan v. Trustees of Cal. State University & Colleges* (1982) 33 Cal.3d 211, 216, fn. 4.)

[27] "Any mailings to the tenant pursuant to this subdivision shall be sent to the address provided by the tenant. If the tenant does not provide an address, mailings

There was sufficient evidence here that Holsman tendered a security deposit of $1,200 to Carrick; Carrick did not return the deposit after Holsman vacated the premises; and Carrick did not provide an accounting of its disposition. Therefore, there was substantial evidence to support the court's finding in favor of Holsman on this claim. The judgment, however, to the extent that it awarded Holsman $18,600 on the sixth cause of action, cannot stand. The amount of the security deposit was $1,200. There was no finding by the trial court that Carrick made a bad faith claim against Holsman or that he retained the security deposit in bad faith such that Holsman would be entitled to statutory damages under section 1950.5, subdivision (*l*). (Cf. *Granberry v. Islay Investments*, *supra*, 9 Cal.4th 750, fn. 6 [observing that jury found that landlord failed to comply with section 1950.5 but made no finding of bad faith].) Further, given Holsman's nonpayment of rent for four months in 2006 and Carrick's testimony that he incurred damages in restoring the premises after Holsman moved out, there was no substantial evidence to support a finding of bad faith, were we to imply such a finding by the court.

We therefore conclude that the award under the sixth cause of action should have been limited to the amount of Holsman's actual damages, i.e., $1,200. Since the proper amount of damages awardable on this claim based upon the evidence presented was certain, and because Holsman had a full and fair opportunity to present evidence of damages (see *Kelly v. Haag, supra,* 145 Cal.App.4th at pp. 919-920), we conclude that there is no need for a retrial on this issue. Accordingly, we find that the proper appellate remedy is to reverse the judgment with directions that judgment be entered in favor of Holsman on the sixth cause of action in the amount of $1,200. (See *Cardinal Health 301, Inc. v. Tyco Electronics Corp.* (2008) 169 Cal.App.4th 116, 153-154.)

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pursuant to this subdivision shall be sent to the unit that has been vacated." (§ 1950.5, subd. (g)(6).)

V. *Eighth Cause of Action (Retaliation)*

Holsman alleged in the eighth cause of action of the complaint that he "exercised his right[] to complain about the uninhabitable conditions" of the premises; he contacted the building inspector for the county in order to inspect the premises; he withheld rent because of the condition of the premises; and that Carrick, in retaliation for Holsman's exercise of these rights, threatened to evict Holsman, decreased services, and commenced an unlawful detainer action. Holsman alleged further that he was entitled to actual damages of $20,000 and statutory damages of $2,000 for each retaliatory act committed by Carrick. The court concluded that " . . . Defendant's first response to Plaintiff's [January 6, 2006] letter was to give [him] a [30]-day notice. Judgment is for Plaintiff."

In *Schweiger v. Superior Court* (1970) 3 Cal.3d 507, 517, the Supreme Court recognized the availability of the defense of retaliation in an unlawful detainer action, where the eviction is sought by a landlord in retaliation for the tenant's exercise of his or her statutory rights. (See also *Barela v. Superior Court* (1981) 30 Cal.3d 244, 252 [affirmative defense of retaliation available where landlord seeks to evict tenant in response to tenant's exercise of right to report landlord's commission of crime].) The principle of *Schweiger* was extended in *Aweeka v. Bonds* (1971) 20 Cal.App.3d 278, 281, where it was held that a tenant could bring an affirmative claim for damages against a landlord for retaliation. The retaliation defense to an unlawful detainer proceeding has also been recognized even where the complaint about tenantability was made only to the landlord, and not to governmental officials. (*Kemp v. Schultz* (1981) 121 Cal.App.3d Supp. 13, 18.)

In addition to a tenant's common law right to assert that a landlord has acted in a retaliatory manner, there are also statutory rights available to a tenant who is the victim of retaliation. (*Barela v. Superior Court, supra*, 30 Cal.3d at p. 251; *Rich v. Schwab* (1998) 63 Cal.App.4th 803, 811.) Under section 1942.5, a tenant may assert retaliation either as a defense or as an affirmative claim for damages. (Friedman et al., Cal. Practice Guide:

Landlord–Tenant, *supra*, ¶ 7:331, pp. 7-76.4 to 7-76.5) Under subdivision (a) of section 1942.5, a tenant may assert that the landlord has acted in retaliation where the tenant has exercised his or her rights (1) to repair defective premises and deduct the amount of the repairs from rent payments as authorized under section 1942; (2) to orally complain about the condition of the premises; (3) make complaint with an appropriate governmental agency for the purpose of attempting to correct a problem with the tenantability of the premises.[28] The statute contains an express proviso that the tenant may assert retaliation "if the lessee of a dwelling is not in default as to the payment of his rent." (§ 1942.5, subd. (a); see also *Western Land Office, Inc. v. Cervantes* (1985) 175 Cal.App.3d 724, 740 [retaliatory eviction defense "not available to a tenant who is himself at legal fault"].)

Here, while there may have been evidence of one or more acts of retaliation by Carrick as defined under section 1942.5, it is plain that the remedy under the statute was unavailable to Holsman because of his own rent default. The lease provided that rent was due on the first day of every month. Holsman admitted that he did not pay any rent in

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[28] "If the lessor retaliates against the lessee because of the exercise by the lessee of his rights under this chapter or because of his complaint to an appropriate agency as to tenantability of a dwelling, and if the lessee of a dwelling is not in default as to the payment of his rent, the lessor may not recover possession of a dwelling in any action or proceeding, cause the lessee to quit involuntarily, increase the rent, or decrease any services within 180 days of any of the following: [¶] (1) After the date upon which the lessee, in good faith, has given notice pursuant to Section 1942, or has made an oral complaint to the lessor regarding tenantability. [¶] (2) After the date upon which the lessee, in good faith, has filed a written complaint, or an oral complaint which is registered or otherwise recorded in writing, with an appropriate agency, of which the lessor has notice, for the purpose of obtaining correction of a condition relating to tenantability. [¶] (3) After the date of an inspection or issuance of a citation, resulting from a complaint described in paragraph (2) of which the lessor did not have notice. [¶] (4) After the filing of appropriate documents commencing a judicial or arbitration proceeding involving the issue of tenantability. [¶] (5) After entry of judgment or the signing of an arbitration award, if any, when in the judicial proceeding or arbitration the issue of tenantability is determined adversely to the lessor. [¶] . . . ." (§ 1942.5, subd. (a).)

2006, despite the fact that he continued to occupy the premises until mid-April. Further, this is not an instance where Holsman demonstrated that he was legally excused from paying any rent such that he could properly assert a retaliation claim. The record does not reflect, for instance, that he availed himself of a tenant's "'repair and deduct' remedy" (*Green*, *supra*, 10 Cal.3d at p. 630) for dilapidated conditions, as provided under section 1942, subdivision (a),[29] under which he might have been excused from failing to pay the full rent due under the lease. Thus, at the time Carrick took the actions claimed to have been in retaliation for Holsman's January 6, 2006 letter and his later contacting of Santa Cruz County officials—namely, Carrick's delivery of the 30-day notice, and initiation of an unlawful detainer action—Holsman was plainly "in default as to the payment of his rent." (§ 1942.5, subd. (a).) The statutory remedies for retaliation under section 1942.5 were therefore not available to him, and any judgment in his favor for statutory retaliation was not supported by substantial evidence.

Moreover, any claim by Holsman for retaliation under the "complementary rights of action" under common law (*Rich v. Schwab*, *supra*, 63 Cal.App.4th at p. 811) is likewise unavailable. First, the record shows that Holsman was "a tenant who [was] himself at legal fault" because he had defaulted in paying rent. (*Western Land Office, Inc. v. Cervantes*, *supra*, 175 Cal.App.3d at p. 740.) Assuming that the premises were in fact uninhabitable as of January 2006, their condition did not excuse Holsman from paying any rent. (Friedman et al., Cal. Practice Guide: Landlord–Tenant, *supra*, ¶ 3:138,

[29] "If within a reasonable time after written or oral notice to the landlord or his agent, as defined in subdivision (a) of Section 1962, of dilapidations rendering the premises untenantable which the landlord ought to repair, the landlord neglects to do so, the tenant may repair the same himself where the cost of such repairs does not require an expenditure more than one month's rent of the premises and deduct the expenses of such repairs from the rent when due, or the tenant may vacate the premises, in which case the tenant shall be discharged from further payment of rent, or performance of other conditions as of the date of vacating the premises. This remedy shall not be available to the tenant more than twice in any 12-month period." (§ 1942, subd. (a).)

p. 3-48 ["notwithstanding a breach of the warranty of habitability, aggrieved tenants must still pay reasonable rent for the period of the breach"].) Second, assuming Holsman could overcome this hurdle, the judgment on the eighth cause of action—assuming it to be based upon a common law claim of retaliation—is not supported by substantial evidence because there is no basis for an award of damages in the judgment amount of $18,600, or in any other amount. As discussed above (see pt. III, *ante*), Holsman presented no proof of actual damages associated with the untenantable condition of the premises.

There was no substantial evidence to support the judgment insofar as it included a finding in favor of Holsman on the eighth cause of action. Accordingly, the finding on that cause of action must be reversed.

VI. *10th Cause of Action (Malicious Prosecution)*

Holsman alleged in the 10th cause of action that Carrick filed the unlawful detainer action without probable cause because it was retaliatory in that arose out of the assertion of Holsman's legal rights. He alleged further that he incurred attorney fees as well as other damages as a result of the filing of the action, entitling him to an award of damages of $50,000, as well as punitive damages. The court concluded in its tentative decision that "[p]laintiff has prevailed here."

The elements of a claim for malicious prosecution consist of " '(a) the institution of an action at the direction of the defendant . . . (b) without probable cause and (c) with malice, (d) termination of the initial action favorably to the plaintiff . . . , and (e) resulting damage.' [Citations.]" (*Drummond v. Desmarais* (2009) 176 Cal.App.4th 439, 449; see also Judicial Council of Cal. Civ. Jury Instns. (2009) CACI No. 1501.) Plainly, there was no evidence presented below that Holsman sustained damage as a result of Carrick's

initiation of the unlawful detainer proceeding.[30] The evidence was that Carrick filed the action in February 2006 and dismissed it the following month, allegedly because he learned that he had filed it prematurely. The record does not show that Holsman was damaged as a result of this filing. Holsman argues on appeal that he would be entitled under this cause of action to "[g]eneral damages . . . [which] would . . . include attorney[] fees and costs to defend the unlawful detainer action." But there is no evidence that he incurred *any* legal fees or costs in defense of the action prior to its dismissal. There is thus no evidence to support a judgment awarding Holsman damages in the amount of $18,600, or in any other amount. Accordingly, we must conclude that there was no substantial evidence to support the court's finding in Holsman's favor on the malicious prosecution claim.

VII. *Conclusion*

We have concluded based upon our careful review of the record that the judgment must be reversed because there was no substantial evidence to support the court's findings in favor of Holsman. Specifically, the judgment must be reversed insofar as it found in favor of Holsman and awarded damages to him as to the third, eighth, and 10th causes of action. Further, although there was evidentiary support for the trial court's finding that Carrick breached the implied warranty of habitability, the award of $18,600 in damages on the fourth cause of action was not supported by substantial evidence. Lastly, although there was substantial evidence to support a judgment in Holsman's favor, there was no substantial evidence to support the amount of damages awarded by the court, and that damage recovery must be limited to $1,200. We will therefore reverse

[30] Although it might be possible to conclude that other elements of the malicious prosecution claim were not satisfied—indeed, it is apparent that Holsman failed to even *plead* one of the elements (i.e., that Carrick brought the unlawful detainer action with malice)—because there was no evidence justifying an award of damages, we need not consider whether there were other grounds for concluding that the court erred in finding in favor of Holsman on this claim.

the judgment and remand the case to the trial court with instructions that the court (a) reevaluate the evidence adduced at the prior trial to determine whether Holsman sustained actual damages and, if so, enter judgment in favor of Holsman and against Carrick on the fourth cause of action in the amount of damages it determines to be appropriate and supported by the evidence; and (b) enter judgment in favor of Holsman and against Carrick on the sixth cause of action in the amount of $1,200.

The judgment awarded Holsman attorney fees and costs, and the court thereafter fixed the amount of fees and costs at $7,500 and $1,296.97, respectively. Since we reverse the judgment, the award of fees and costs falls; accordingly, upon remand, the trial court must reverse the order awarding fees and costs. (See *Allen v. Smith* (2002) 94 Cal.App.4th 1270, 1284.) Upon reversal of that order in connection with our instructions that the court enter a new judgment in favor of Holsman on the sixth cause of action, and (if it determines that Holsman sustained actual damages) in favor of Holsman on the fourth cause of action, the court is directed to determine (a) whether there is a legal basis for recovery of attorney fees by Holsman,[31] and if so, the amount of reasonable attorney fees, if any, that should be awarded, and (b) whether, in the court's discretion, Holsman should be awarded statutory costs, and, if so, the appropriate amount of costs that should be awarded.

[31] We observe, without deciding the question of attorney fees, that the subject lease did not include a provision for the recovery of attorney fees by the prevailing party in the event of a dispute or litigation; the prayer of Holsman's complaint contained a request for "statutory attorney fees"; the complaint alleged an entitlement to attorney fees with respect to only the fifth, sixth, and eighth causes of action; by reason of our reversal of the judgment, Holsman's entitlement to attorney fees is governed by the question of whether such fees are recoverable under the sixth cause of action as prayed; and it does not appear from our reading of the statute that section 1950.5 includes a provision that a tenant seeking recovery of a security deposit is entitled to attorney fees from the landlord if the tenant prevails in such action.

DISPOSITION

The judgment is reversed. The matter is remanded to the trial court with instructions to enter judgment in favor of Holsman against Carrick on the sixth cause of action of the complaint in the amount of $1,200. The court is directed further to determine, from the evidence presented at the prior trial, the amount of damages, if any, that Holsman sustained and to which he is entitled to a recovery on the fourth cause of action. After the court vacates its prior order of June 4, 2008, awarding attorney fees and costs to Holsman, the court is directed to determine (a) whether there is a legal basis for recovery of attorney fees by Holsman, and if so, the amount of reasonable attorney fees, if any, that should be awarded, and (b) whether, in the court's discretion, Holsman should be awarded statutory costs, and, if so, the appropriate amount of costs that should be awarded. Costs on appeal are awarded to appellant Carrick.

Duffy, J.

WE CONCUR:

Rushing, P.J.

McAdams, J.